Supreme Court, U. S.
FILED
MAR 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1131

In the matter of

THE VENDO COMPANY, a Missouri corporation,
Petitioner.

REPLY OF PETITIONER IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS AND PETITION FOR MANDAMUS

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(1) Respondents do not deny that this Court's decision held the preliminary injunction to be invalid.

The crucial issue is whether this Court's decision of June 29, 1977, held the preliminary injunction to be invalid; if so, the injunction should promptly have been vacated on remand. Remarkably, in their brief in opposition to the petition for mandamus, *respondents do not even deny that this Court held the preliminary injunction to be invalid*—or, in the words of the concurring opinion, that "the state-court proceeding in this case should not have been enjoined by the federal court" (97 S.Ct. at 2893-94).

However, while tacitly conceding the invalidity of the preliminary injunction, respondents seek to get around that concession by arguing that this Court should nevertheless not take action to enforce compliance with its own judgment.

(2) Non-compliance with this Court's judgment cannot be excused because of the possibility that respondents may ultimately seek other relief not precluded by this Court's judgment.

In their brief in opposition (pp. 4-7), respondents' principal argument is that they "Are Not Attempting To Obtain Relief In The District Court Denied Them On Rehearing In The Supreme Court" and that instead "Respondents Seek New Relief Based On New Facts" (p. 4). They claim that the District Court should hold a "new hearing" so that they can present "further evidence, newly discovered since the prior hearing" which they claim would warrant entry of a *new* preliminary injunction (p. 6). But such contentions have nothing whatsoever to do with the issue before this Court on Vendo's petition.

To begin with, respondents have not filed any motion with the District Court asking for entry of a new preliminary injunction. Nor have they requested the District Court to hold a "new hearing".

But, in any event, respondents' argument is a *non sequitur*. Even assuming at this late date that they were to "seek new relief based on new facts", *that would not justify the continuation in effect of the preliminary injunction which this Court held to be prohibited by Section 2283.* In other words, irrespective of whatever rights or remedies may still be available to the respondents, there is no reason why the prior injunction, held to be invalid by a majority of this Court, should remain in effect in the interim.

Respondents (pp. 6-7) contend that the District Court "should examine the trial court record, permit it to be supplemented by further evidence, and make findings, fully warranted by that evidence, which would cure the deficiencies referred to in the Supreme Court's concurring opinion . . . ." Respondents have been free to file a motion seeking such relief, but they have not done so. Instead, their position is that the preliminary injunction issued in June 1975

and held invalid by this Court should be kept in force until such time as they choose to file such a motion and eventually obtain a ruling on their yet-to-be-filed motion. Respondents' position not only flouts this Court's decision but also defies logic and is wholly unsupported by precedent.

As this Court pointed out in its January 23, 1978 *per curiam* opinion (p. 3), quoting *In re Sanford Fork and Tool Co.*, 160 U.S. 247, 255 (1895):

> "[w]hen a case has been once decided by this Court on appeal and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. . . . If the Circuit Court mistakes or misconstrues the decree of this Court and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this Court."

In language quoted by respondents (p. 5), the Court in *Sanford* (*id.* at 259) also admonished: "It must be remembered, however, that no question, once considered and decided by this Court, can be reexamined at any subsequent stage of the same case."•

• Contrary to respondents' argument (pp. 4-5), the *Sanford* decision does not in any way support their position. In that case, the defendants asked the Supreme Court to order the trial court (*i.e.*, the "Circuit Court") to enter a final judgment in their favor on the merits, on remand from a prior decision of the Supreme Court which had merely reversed a decision *on the pleadings*. Defendants argued that the case had been submitted "on bill and answer" under the old federal Equity Rules, and that the Supreme Court's prior decision on the pleadings had therefore disposed of the merits of the whole case. The Supreme Court disagreed, and directed the trial court to proceed with completion of pleading and a trial on the facts.

(Footnote continued on next page)

(3) Mandamus relief is not "premature".

Respondents further contend (pp. 7-8) that mandamus relief would be "premature". This argument is similarly without merit.

If Vendo is correct, as set forth in the petition for mandamus, *and not controverted by respondents' brief in opposition,* that this Court's decision of June 29, 1977 invalidated the preliminary injunction, then it necessarily follows that the injunction should have been vacated over eight months ago. In these circumstances, compliance with this Court's judgment is long overdue and certainly is not "premature".*

(Footnote continued from previous page)

Obviously, no such issue is presented here. This Court's decision of June 29, 1977 was not a decision on the pleadings, but rather on the very power of the District Court to issue the 1975 preliminary injunction. While respondents concede that "no question, once considered and decided by this Court, can be reexamined at any subsequent stage of the same case," they nevertheless now seek to relitigate the validity of the 1975 injunction—the very question decided by this Court in its June 29, 1977 opinion.

Rudiger v. *Coleman,* 328 N.Y. 225, 126 N.E. 723 (1920), cited by respondents at p. 4, is wholly inapplicable here. That case involved an intervening change of circumstances, occurring during the pendency of the appeal and remand, that had made it impossible for the lower court to carry out the directions contained in the Court of Appeals' mandate. The Court of Appeals had directed that on remand an order be entered compelling reconveyance of certain real estate, but in the meantime part of the property had been condemned and thus could no longer be reconveyed. Here, there is no possible argument that the judgment of this Court cannot be carried out. At most, respondents seek an opportunity to present further evidence of facts occurring *prior* to entry of the injunction and thus seek to litigate matters which have already been decided.

* It is significant, moreover, that the District Judge has chosen not to file any objection to the mandamus petition, although he was served in accordance with this Court's Rules and its January 23, 1978 *per curiam* opinion and had a clear opportunity to object if he wished. On the contrary, we believe that the District Judge would welcome this Court's instructions on the matter.

(4) This Court should enforce its own judgment.

Respondents (pp. 3-4) also question petitioner's statement (Petition, p. 5) that "Vendo has applied to this Court for such relief, rather than to the Court of Appeals, because compliance with this Court's own decision is required". The petition further points out (p. 5) that "The Court of Appeals took no action on remand other than to further remand the matter to the District Court 'for further proceedings in conformity with the opinion of the United States Supreme Court' ".

It is well-established that a petition for mandamus to enforce this Court's judgment should be directed to this Court. As pointed out in Stern and Gressman, Supreme Court Practice (4th Ed. 1969), p. 413:

> "One function of the writ of mandamus is to force a lower court to comply with the mandate of an appellate court. *When the mandate in question is that of the Supreme Court, application for the writ must, of course, be made to that Court.*" (Emphasis added.)

Indeed, this Court's January 23, 1978, *per curiam* opinion in this case (p. 3) recognized the propriety of this Court's issuance of mandamus in such circumstances.

Only this Court can effectively enforce its own judgment, and it is now abundantly plain that any other course would result in further unconscionable delay—not only in securing compliance with this Court's decision of June 29, 1977, but also in giving effect to the Illinois Supreme Court decision of November 27, 1974, which this Court held had been wrongfully enjoined.

CONCLUSION

Respondents tacitly concede that this Court held the preliminary injunction to be invalid, but nevertheless seek to keep the invalid injunction in effect. It is difficult, we believe, to conceive of a clearer case for mandamus relief.

For the reasons stated above and in the petition for mandamus, the Court should direct dissolution of the preliminary injunction and if necessary issue a writ of mandamus to that effect.

Respectfully submitted,

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Dated: March 20, 1978